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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF FOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

Amici curiae National Association of Mutual Insurance Companies (NAMIC) and Property Casualty Insurers Association of America (PCIAA) respectfully submit this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICI

NAMIC and PCIAA are two of the leading trade associations of property and casualty insurers. NAMIC represents over 1350 member companies, and PCIAA represents over 1000 member companies, which collectively write every type of property and casualty insurance in every state.

Amici and their members have a substantial interest in seeing that this Court's decision in *State Farm Mutual*

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of amicus briefs have been submitted to the Clerk.

Automobile Insurance Co. v. *Campbell*, 538 U.S. 408 (2003), is respected and its guidance to the lower courts faithfully applied. The proliferation of outsize punitive damages awards has been a problem of special concern to the insurance industry.[2] The Utah Supreme Court's decision on remand from this Court in *State Farm* threatens to exacerbate that problem by disregarding this Court's considered judgment as to the proper measure of punitive damages for State Farm's conduct, and distorting and misapplying the constitutional standards for review of punitive damages awards articulated in *State Farm*. In particular, the Utah court's reasoning raises the specter of excessive and arbitrary punitive damages awards in insurance cases.

INTRODUCTION AND STATEMENT OF THE CASE

"Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting); *see also State Farm*, 538 U.S. at 417; *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) ("Punitive damages pose an acute danger of arbitrary deprivation of property.").

Prompted by "concerns over the imprecise manner in which punitive damages systems are administered" and the resulting danger of arbitrary awards, this Court originally granted certiorari in this case and set aside the Utah Supreme Court's reinstatement of a $145 million punitive damages judgment against State Farm. *State Farm*, 538 U.S. at 417. The plaintiffs, who had purchased third-party liability insurance from State Farm, had been awarded $1 million in compensatory damages for emotional distress resulting from

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[2] One empirical study of jury verdicts in financial injury cases found that the ratio of punitive to compensatory damages was higher in insurance cases than in any other type of case. *See* Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts* 22-24 & tbl. 3.3 (RAND Institute for Civil Justice 1997).

State Farm's failure to settle a lawsuit against them within policy limits. *See id.* at 412-415.

Applying and elucidating the constitutional standard previously articulated in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), the Court found that this case was "neither close nor difficult" and that the $145 million award was an arbitrary deprivation of property in violation of due process. *State Farm*, 538 U.S. at 418, 429. Based on its own application of the *Gore/State Farm* guideposts to the facts of this case, this Court concluded that those guideposts "likely would justify a punitive damages award at or near the amount of compensatory damages"—that is, approximately $1 million. *Id.* at 429. Accordingly, the Court vacated the Utah Supreme Court's judgment and remanded for further proceedings not inconsistent with its opinion. *See id.*

On remand, the Utah Supreme Court disregarded this Court's guidance. Instead, it determined that a punitive damages award of $9,018,780.75 was warranted—an amount nine times greater than the award this Court had endorsed. App. 1a.[3] To reach this conclusion, the Utah Supreme Court contradicted this Court's specific findings and seriously misapprehended and distorted the constitutional standard set out in *Gore* and *State Farm*. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue, but, even more seriously, undermines *State Farm*'s utility in providing much-needed guidance to the lower courts.

REASONS FOR GRANTING THE WRIT

Amici respectfully submit that this Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Utah Supreme Court, pursuant to Supreme Court Rule 16. In the alternative, the Court should grant plenary review and set the case for briefing and argument. Granting the writ is appropriate here for two reasons.

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[3] The opinion of the Utah Supreme Court is reproduced in the Appendix to the Petition for a Writ of Certiorari, which is cited as "App."

First, the Utah Supreme Court flouted this Court's opinion and mandate, disregarding the Court's carefully reasoned conclusions as to the degree of reprehensibility of State Farm's conduct and the proper proportion between punitive and compensatory damages in this case. Summary reversal is therefore appropriate to correct the Utah Supreme Court's failure to heed this Court's clear direction. *See, e.g.*, *Sumner* v. *Mata*, 455 U.S. 591, 596-597 (1982) (granting certiorari and summarily vacating and remanding where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to ensure compliance with its own remand orders.").

Second, review is necessary to fulfill the Court's objective in reviewing and reversing the Utah Supreme Court's prior judgment in this case: to alleviate serious "concerns over the imprecise manner in which punitive damages systems are administered" and to provide a specific, reasoned, and consistent standard for lower courts to follow when evaluating punitive damages awards. *State Farm*, 538 U.S. at 417. Because it so drastically misinterprets and misapplies this Court's *State Farm* decision, if allowed to stand, the Utah court's decision threatens to undermine the principles articulated in *State Farm* and to reintroduce into the administration of punitive damages the dangerous arbitrariness that due process precludes. Moreover, the Utah court's rationale is likely to prove particularly pernicious to insurers; if emulated, it could ultimately jeopardize the availability of affordable liability insurance.

I. THE UTAH SUPREME COURT'S AWARD OF PUNITIVE DAMAGES CONTRAVENED THIS COURT'S MANDATE AND THE REQUIREMENTS OF DUE PROCESS.

As this Court explained in *Gore*, and reiterated in *State Farm*, grossly excessive or arbitrary awards of punitive damages violate the Due Process Clause because "[e]lementary notions of fairness . . . dictate that a person

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574; *accord State Farm*, 538 U.S. at 418.

To ensure that this basic requirement of fair notice has been met, *Gore* and *State Farm* mandate that courts reviewing punitive damages awards "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418; *accord Gore*, 517 U.S. at 575; *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

In *State Farm*, this Court both refined the *Gore* test and applied it to the specific facts of this case, concluding that "a punitive damages award at or near the amount of compensatory damages" was appropriate. *State Farm*, 538 U.S. at 429. On remand, the Utah Supreme Court failed to follow this Court's clear direction and entered an award of punitive damages nine times larger. In doing so, it impermissibly rejected this Court's specific findings, and misapprehended and misapplied each of the three *State Farm* guideposts.

A. The Utah Supreme Court Failed To Respect This Court's Reprehensibility Analysis And Erroneously Held That Breach Of An Insurance Contract Is Equivalent To Physical Injury.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). In order to ensure that the reprehensibility guidepost is susceptible of reasoned and consistent application, this Court in *State Farm* instructed lower courts to consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had fi-

nancial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.*; *see also Gore*, 517 U.S. at 576-577. As the Utah court acknowledged, this Court intended these five factors as "measuring tools" to prevent assessments of reprehensibility from reaching "arbitrary, inexplicable, and disproportionate outcome[s]." App. 8a. Together, these factors establish a federal constitutional standard for evaluating a defendant's reprehensibility.

This Court assessed the blameworthiness of State Farm's conduct in light of that standard, and concluded that while "State Farm's handling of the claims against the Campbells merits no praise, . . . a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives." *State Farm*, 517 U.S. at 419-420. The Court ultimately determined punitive damages of approximately $1 million would be appropriate. *See id.* at 429. On remand, the Utah Supreme Court disregarded this Court's considered analysis, finding that, "in light of Utah's values and traditions," State Farm's conduct should be deemed "several degrees more offensive than the Supreme Court's less than condemnatory view that [it] 'merits no praise.'" App. 7a (quoting *State Farm*, 517 U.S. at 419).

The Utah court erred by assuming "Utah's values and traditions" licensed it to reinterpret the federal constitutional standards for measuring reprehensibility set out in *State Farm*.[4] And the court misapplied each of the five indi-

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[4] The Utah court wrongly believed that *State Farm* did not "announce[] a federal standard measuring reprehensibility." App. 6a. It reasoned that "[b]y creating such a national reprehensibility standard, . . . the Supreme Court would have collided with its own rationale for limiting the scope of relevant reprehensibility evidence to intra-state conduct. . . . The Supreme Court respected states' autonomy to make policy choices about the lawfulness of human and corporate behavior within their own borders . . . ." *Id.* That reasoning misses the mark. *Gore* and *State Farm* held that, in imposing punitive damages, a state may as a general rule consider only conduct that occurred in that state. *See State Farm*, 538 U.S. at 421; *Gore*, 517 U.S. at 572-573. That rule derives from the basic constitutional and structural principle that a state has no power to regu-

cia of reprehensibility identified by this Court. In particular, the court ignored this Court's express conclusion that State Farm's actions caused no physical harm and the conduct in question was not repeated—and therefore a high award of punitive damages could not be grounded on either of those factors.[5] In both instances, the Utah court's analysis eviscerates the restraints that this Court identified, and opens the door to the indiscriminate and arbitrary imposition of punitive damages—particularly in insurance disputes.

1. This Court expressly found that the harm to the Campbells "arose from a transaction in the economic realm, not from some physical assault or trauma" and "there were no physical injuries." *State Farm*, 538 U.S. at 426. Moreover, because State Farm paid the excess judgment before the bad faith action was brought, "the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Id.*

Although it claimed to be "mindful" of these conclusions (App. 9a), the Utah Supreme Court disregarded their clear import. It reasoned that policyholders purchase insurance in part to obtain "peace of mind," and failure to pay claims may cause psychological distress. App. 10a (citation and internal quotation marks omitted). It thus concluded that the harm

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late conduct occurring outside its borders. *See State Farm*, 538 U.S. at 421; *Gore*, 517 U.S. at 572-573; *see also, e.g., Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) (noting that a state has no "power or supervision over the internal affairs of another [s]tate"). Needless to say, it does not follow that the federal Constitution imposes no limitations on a state's "autonomy" to decide how to punish conduct occurring within that state. Although states may possess broad discretion with respect to the imposition of punitive damages, that discretion may be exercised only within the substantive boundaries set by the Due Process Clause. *See, e.g., Cooper Indus.*, 532 U.S. at 433; *State Farm*, 538 U.S. at 417. And the standards for measuring reprehensibility set out in *Gore* and *State Farm* recognize that, as a matter of federal constitutional law, "some wrongs are more blameworthy than others." *Gore*, 517 U.S. at 575.

[5] Amici agree with petitioner's discussion of the Utah Supreme Court's treatment of the remaining three factors (*see* Pet. Br. 11-13, 15-16) but believe it is unnecessary to repeat that discussion here.

caused by State Farm—and, indeed, any "misconduct which occurs in the insurance sector of the economic realm"—is "more closely akin to physical assault or trauma than to mere economic loss." App. 10a-11a.

The Utah court's remarkable analysis not only contradicts this Court's express findings, but strips the "physical harm" factor of any usefulness in distinguishing between conduct of greater and lesser culpability. As *Gore* explained, the physical harm factor reflects the basic principle, embodied in tort and criminal law, that "nonviolent [wrongs] are less serious than [wrongs] marked by violence or the threat of violence." *Gore*, 517 U.S. at 577 (quoting *Solem* v. *Helm*, 463 U.S. 277, 292-293 (1983)). Conduct, like State Farm's here, that does not threaten or inflict any physical harm is thus lower on the scale of reprehensibility than conduct that does cause physical injury—as this Court recognized.

The Utah Supreme Court's contrary conclusion is likely to result in particularly harmful consequences to insurers. Under the Utah court's analysis, every breach of an insurance contract is elevated into an injury of the same gravity as physical assault. That reasoning threatens to expose insurers to the prospect of uncontrolled punitive damages awards in cases where failure to settle within policy limits results in claimed emotional distress—even where, as here, there is no physical injury and no significant economic harm.[6] Far from advancing the States' legitimate interest in deterrence, such indiscriminate awards merely create incentives for insurers to settle unmeritorious claims and ultimately make liability insurance more difficult or costly to obtain. *See infra* Part II.

2. The reprehensibility test articulated in *Gore* and *State Farm* recognizes that "repeated misconduct is more reprehensible than an individual instance of malfeasance," and that recidivism can therefore justify a higher award of punitive damages. *Gore*, 517 U.S. at 577; *see State Farm*,

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[6] The Utah court conceded that, because State Farm ultimately paid the entire excess judgment, "the economic harm sustained by the Campbells [was] minimal." App. 9a.

538 U.S. at 419. In its original decision, the Utah Supreme Court found that this factor supported the punitive damages award because, in light of what the Utah court viewed as State Farm's lack of remorse, and the lack of evidence that its policies had changed, "the probability of recurrence of State Farm's misconduct appears extremely high." *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1150 (Utah 2001) (citation omitted).

This Court specifically found that the Utah Supreme Court had erred in finding that State Farm was a recidivist. *State Farm*, 538 U.S. at 423. And the Court admonished that "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the *only* conduct relevant to the reprehensibility analysis." *Id.* at 424 (emphasis added).

This Court thus made perfectly clear that, on these facts, the "repeated misconduct" factor could not justify an award of punitive damages. But the Utah Supreme Court defied that judgment. Although it grudgingly acknowledged that it was "bound by the Supreme Court's finding that State Farm was not a recidivist" (App. 13a), it nevertheless reverted to the very same mistaken rationale it had previously employed, concluding that, based on its putative lack of remorse, State Farm was likely to become a recidivist in the future. State Farm's supposed lack of remorse, in turn, was based on nothing more than its assertion in the litigation of the case against it, and in its brief on appeal, that its actions had not been wrongful. *Id.* The court reasoned that "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury . . . . State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." *Id.*

This analysis not only contradicts this Court's decision, but threatens to eviscerate the "repeated misconduct" factor altogether. If a reviewing court's mere speculation that a defendant might commit bad acts in the future can justify a finding of reprehensibility—in the absence of *any* evidence of repeated wrongful conduct—then such a finding is possi-

ble in nearly every case. The Utah court's distortion of the repeated misconduct factor contravenes this Court's admonition that punitive damages be reserved for the exceptional case where the defendant's conduct "is so reprehensible as to warrant the imposition of further sanctions" beyond compensatory damages. *State Farm*, 538 U.S. at 419.

In *State Farm*, this Court made clear that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. The Utah court's analysis flouts that instruction and permits punitive damages to be based solely on the court's subjective conclusion that the defendant is the type of "unsavory" business that is likely to commit bad acts in the future—rendering the reprehensibility inquiry susceptible to precisely the kind of arbitrary and discriminatory application this Court has been concerned to avoid. "[T]he point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting); *accord State Farm*, 538 U.S. at 418.

Finally, resting an award of punitive damages on a defendant's refusal to admit wrongdoing in the litigation against it creates significant due process problems in its own right. As this Court admonished in this very case, due process does not permit the assessment of punitive damages against a defendant for lawful conduct. *See id.* at 421; *Gore*, 517 U.S. at 572-573. Nor does it permit a defendant to be punished for exercising its right to defend itself and to appeal from an adverse judgment. *See, e.g., Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"; a person cannot constitutionally be punished for appealing a conviction) (cited in *Gore*, 517 U.S. at 573 n.19). The Utah court's contrary reasoning impermissibly burdens defendants' exercise of their constitutionally protected right to defend against

liability and erroneously expands the boundaries of the reprehensibility analysis far beyond those set by this Court.

B. The Utah Supreme Court Improperly Ignored This Court's Conclusions Regarding The Appropriate Ratio Of Punitive To Compensatory Damages On The Facts Of This Case.

It is well-settled that punitive damages "must bear a 'reasonable relationship' to compensatory damages." *Gore*, 517 U.S. at 580 (citation omitted); *see also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *Haslip*, 499 U.S. at 23. In *State Farm*, this Court did more than in any past case to give meaningful guidance to the lower courts on what constitutes a "reasonable relationship" between punitive and compensatory damages. Specifically, the Court made clear that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. Although it noted that greater ratios "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages,'" *id.* (quoting *Gore*, 517 U.S. at 582), it explained that "[t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *id.*

That scenario, the Court found, precisely captured the facts of this case: "The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation." *Id.* at 426. Moreover, "[t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer, and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element." *Id.* "[I]n light of the substantial compensatory damages awarded (a portion of which contained a punitive element)," the Court concluded that this

case "likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.[7]

The Utah Supreme Court paid no heed to that conclusion. Instead, it distorted this Court's careful articulation of the reasonable relationship inquiry beyond recognition, disregarded this Court's express finding that the compensatory damages award here contained a punitive element, and ultimately adopted a punitive damages award nine times higher than the award this Court had endorsed.[8]

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[7] The Utah court reasoned that it was not bound to follow this Court's conclusions regarding the appropriate measure of punitive damages because "[t]hese are words of prediction, not direction." App. 5a. That reading of this Court's opinion wholly fails to acknowledge that this Court carefully considered the application of the constitutional standards to the facts of this case, and, although it chose not to specify the precise amount of punitive damages that could be awarded, provided clear guidance to the Utah court that an award "at or near the amount of compensatory damages" would be proper. *State Farm*, 538 U.S. at 429.

[8] Since *State Farm*, in cases where compensatory damages were at least $1 million, the nine-to-one ratio approved by the Utah Supreme Court here is the highest ratio of which amici are aware to have been upheld against a federal constitutional challenge. *See Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) ($1,920,849 in compensatory damages and $5 million in punitive damages, for ratio of 2.6:1); *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004) ($2.1 million in compensatory damages and $10 million in punitive damages, for ratio of 4.8:1; affirming district court's reduction of punitive damages from $17,875,000 to $10 million in light of *State Farm*); *2660 Woodley Road Joint Venture* v. *ITT Sheraton Corp.*, 369 F.3d 732 (3d Cir. 2004) ($1,350,000 in compensatory damages and $2,025,000 in punitive damages, for ratio of 1.5:1); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($15 million in compensatory damages and $50 million in punitive damages, for ratio of 3.3:1), *cert. denied*, 124 S. Ct. 1423 (2004); *Bogle* v. *McClure*, 332 F.3d 1347 (11th Cir. 2003) (approximately $3.5 million in aggregate compensatory damages and approximately $13.3 million in aggregate punitive damages, for ratio of 3.8:1); *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d 746 (N.D. Ill. 2004) ($8.3 million in compensatory damages and $27.7 million in punitive damages, for ratio of 3.3:1); *In re the Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) ($513,147,740 in compensatory damages and $4.5 billion in punitive damages, for ratio of 8.8:1); *TVT Records* v. *Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($23,496,746 in compensatory damages and $29,125,000 in punitive damages, for ratio of 1.2:1; reducing punitive damages from $108 million to

First, the Utah court misstated, and in doing so dramatically narrowed, the circumstances in which this Court explained that a low ratio of punitive to compensatory damages is proper. The court erroneously suggested that the one-to-one ratio endorsed by this Court in this precise case is appropriate only "where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." App. 15a-16a. Because the compensatory damages in this case were for emotional distress, the Utah court reasoned that a one-to-one ratio was insufficient: "We have no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation

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$29,125,000 in light of *State Farm*); *Republic Tobacco, L.P.* v. *North Atlantic Trading Co.*, No. 98 C 4011, 2003 WL 22794561 (N.D. Ill. Nov. 21, 2003) ($3.36 million in compensatory damages and $4.08 million in punitive damages, for ratio of 1.2:1); *Ceimo* v. *General Am. Life Ins. Co.*, No. CV-00-1386-PHX-FJM (D. Ariz. Sept. 17, 2003) ($6,692,610.60 in compensatory damages and $7 million in punitive damages, for ratio of 1:1; reducing punitive damages from $79 million to $7 million in light of *State Farm*); *Union Pac. R.R. Co.* v. *Barber*, No. 03-57, 2004 WL 352525 (Ark. Feb. 26, 2004) ($5.1 million in compensatory damages and $25 million in punitive damages, for ratio of 4.9:1); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346 (Ark.) ($5 million in compensatory damages and $21 million in punitive damages, for ratio of 4.2:1), *cert. denied*, 124 S. Ct. 532 (2004); *Henley* v. *Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App.) ($1.5 million in compensatory damages and $9 million in punitive damages, for ratio of 6:1; reducing punitive damages from $25 million to $9 million in light of *State Farm*), *rev. granted*, 88 P.3d 497 (Cal. 2004); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003) ($4,574,429 in compensatory damages and $23,723,287 in punitive damages, for ratio of 5.2:1; reducing punitive damages from $290 million to $23,723,287 in light of *State Farm*); *Sufix U.S.A. Inc.* v. *Cook*, 128 S.W.3d 838 (Ky. Ct. App. 2004) (approximately $2.8 million in compensatory damages and approximately $3 million in punitive damages, for ratio of 1.1:1); *Honzawa* v. *Honzawa*, 766 N.Y.S.2d 29 (N.Y. App. Div. 2003) ($11 million in compensatory damages and $15 million in punitive damages, for ratio of 1.4:1); *Gallegos* v. *Elite Model Mgmt. Corp.*, No. 120577/00, 2004 WL 51604 (N.Y. Sup. Ct. Jan. 6, 2004) ($1.1 million in compensatory damages and $2.6 million in punitive damages, for ratio of 2.4:1); *Austin* v. *Specialty Transp. Servs., Inc.*, 358 S.C. 298 (S. C. Ct. App. 2004) ($1,025,000 in compensatory damages and $2,600,000 in punitive damages, for ratio of 2.5:1); *Smith* v. *Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003) ($1,007,221 in compensatory damages and $5.5 million in punitive damages, for ratio of 5.5:1), *cert. denied*, 124 S. Ct. 1716 (2004).

is markedly more egregious than conduct which results in $1 million of economic harm." App. 16a.

But the rule articulated by this Court is nowhere limited to cases in which the damages were solely for economic injury. Rather, this Court explained that a low ratio of punitive to compensatory damages is likely to be appropriate in any case where "compensatory damages are substantial." *State Farm*, 538 U.S. at 425. And it expressly concluded that a ratio at or near one-to-one was appropriate *in this case* despite the fact that all the damages were for non-economic injury. Likewise, the Utah court could not justify its disregard of this Court's direction by suggesting that a one-to-one ratio is appropriate only in cases of "unremarkable reprehensibility." This Court itself assessed the reprehensibility of State Farm's conduct, and found a ratio at or near one-to-one warranted.

The limitations the Utah court imposed not only contradict this Court's conclusions regarding the facts of this very case, but fail to take into account the reason that, as this Court stated, substantial compensatory damages generally support a lower ratio of punitive damages. That is so because, in cases where the plaintiff is fully compensated, and compensatory damages are thus a fair measure of the full extent of the harm caused by the defendant's conduct, punitive damages that significantly exceed compensatory damages are not necessary to achieve the goals of punishment and deterrence. *See id.* at 419 (punitive damages are appropriate only where compensatory damages do not adequately punish and deter).

The Utah Supreme Court's misguided rationale thus significantly undermines the purpose of the ratio inquiry—to ensure that punitive damages bear a reasonable relationship to the actual or potential harm caused by the defendant's conduct. *See Gore*, 517 U.S. at 580; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. In cases involving damages for non-economic harm, the Utah court's reasoning fails to take an accurate measure of the harm caused, and injects into the ratio inquiry the same subjective considerations that distorted its reprehensibility analysis.

Second, the Utah court's conclusion flies in the face of this Court's determination that a substantial compensatory award solely for emotional distress generally—and in this particular case—supports a lower ratio of punitive damages to compensatory damages. As this Court explained, because damages for emotional distress, like punitive damages, are intended to condemn outrageous conduct, such damages already include a punitive component by definition. *See State Farm*, 538 U.S. at 426, 429; Restatement (Second) of Torts § 908 cmt. c (1977) ("In many cases in which compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."); *cf. also Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) ("Many awards of compensatory damages doubtless contain something of a punitive element . . . ."). Accordingly, in such a situation, punitive damages are likely to be duplicative of the compensatory award, and hence excessive in relation to the legitimate purposes of retribution and deterrence.

Indeed, this Court specifically found such duplication had occurred here, concluding that a portion of the compensatory damages award "contained a punitive element," and that a ratio of punitive to compensatory damages at or near one-to-one was therefore appropriate. *State Farm*, 538 U.S. at 429. The Utah court disregarded that conclusion, asserting that although this Court's concern over duplication was "plausible as an abstract proposition," the compensatory damages here were "purged of elements . . . more properly placed in the category of punitive damages." App. 15a. For the reasons given by petitioner (Br. 27), the Utah court's rejection of this Court's specific finding—which, properly understood, was binding on the lower court—was error.

As discussed above, however, the Utah Supreme Court's error went beyond its disregard of this Court's specific conclusions regarding the facts of this case. The Utah court's failure to heed this Court's guidance regarding the considerations that should govern the ratio inquiry threatens to render that inquiry an empty form, and once again to

permit arbitrary and subjective assessments to prevail over the reasoned standards articulated in *State Farm*. This Court should correct that error.

C. The Utah Supreme Court Failed To Conduct Any Reasoned Analysis Of The Comparable Penalties Guidepost.

The third guidepost by which *Gore* and *State Farm* instruct reviewing courts to examine punitive damages awards is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). As with the first two guideposts, this Court expressly considered the application of the comparable penalties guidepost to the facts of this case, finding that "[t]he most relevant civil sanction under Utah state law . . . appears to be a $10,000 fine for an act of fraud." *Id.* at 428. Although the Utah Supreme Court accepted this Court's finding, it conducted no reasoned analysis whatsoever of the relationship between that legislatively authorized penalty and the over $9 million award of punitive damages.

Instead, while paying lip service to the comparable penalties inquiry, the Utah court disparaged its usefulness, commenting that "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic." App. 17a. In support of that notion, it noted that "while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award," that amount is the maximum fine that may be imposed on a person under Utah law for commission of a first-degree felony. *Id.* And it observed that "[t]he Supreme Court endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine." *Id.* Based on these two observations, the court concluded that the award of over $9 million was "amply supported by the $10,000 civil penalty." App. 18a.

This approach to the comparable penalties inquiry empties it of any meaningful content. The Utah court's analogy between the $10,000 civil fine that this Court deemed the

appropriate point of reference here and the $10,000 fine that may be imposed under Utah law for a first-degree felony cannot bear scrutiny. A first-degree felony is punishable not only by a $10,000 fine, but also by a prison term, which may in some instances be life. *See* Utah Code Ann. § 76-3-203(1). Accordingly, whether the court meant to suggest that conduct punishable by a $10,000 civil fine is as reprehensible as a first-degree felony, or merely that the amount of the fine is an unreliable guide to the legislature's judgment regarding the seriousness of the conduct at issue, its reasoning is unsound. As this Court expressly found, *see State Farm*, 538 U.S. at 428, the $10,000 civil fine best reflects the "legislative judgment[] concerning appropriate sanctions for the conduct at issue," *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part). The Utah court improperly discounted that legislative judgment. Nor is it clear how this Court's conclusion that an award of $1 million would be appropriate can justify the Utah court's choice of an award nine times higher. Indeed, the opposite is true.

Most fundamentally, the Utah court's reasoning utterly disregards the purpose of the comparable penalties inquiry: to ensure that a defendant in a civil action, consistent with the requisites of due process, has "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574; *accord State Farm*, 538 U.S. at 417. The Utah court did not even attempt to explain how the possibility of a $10,000 fine could put a defendant on notice that its conduct might result in a $9 million punishment.

II. THIS CASE IS OF PARAMOUNT IMPORTANCE TO THE DEVELOPMENT OF REASONED STANDARDS GOVERNING IMPOSITION OF PUNITIVE DAMAGES, PARTICULARLY IN INSURANCE CASES.

This Court was originally led to grant certiorari in this case and to reverse the Utah Supreme Court's judgment by its "concerns over the imprecise manner in which punitive damages systems are administered" and the consequent

danger of unconstitutionally excessive and arbitrary awards of punitive damages. *State Farm*, 538 U.S. at 418. In order to ameliorate that danger, this Court undertook to clarify the constitutional standards governing review of punitive damages. Although the guideposts set out in *State Farm* built on those identified in *Gore*, *State Farm* greatly furthered the development of a rational, consistent jurisprudence of punitive damages by elucidating those guideposts and making them more specific and concrete.

The Utah Supreme Court's decision, if allowed to stand, threatens to undo the work done in *State Farm* to achieve a rational and consistent federal standard for reviewing punitive damages. The Utah court either disregarded this Court's guidance, or applied it in such a way as to render it a nullity. Although it purported to apply the five factors this Court identified as governing the reprehensibility analysis, it believed itself free to reinterpret those factors "in light of Utah's values and traditions." App. 7a. If other courts follow the Utah court's approach, *State Farm* will do little to restrain the imposition of arbitrary and excessive awards, and the "devastating potential for harm" posed by such awards will go unchecked. *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting); *see State Farm*, 538 U.S. at 417.

The Utah court's reasoning poses a particular threat of excessive and harmful punitive damages awards in insurance actions. The Utah court rendered meaningless the distinction drawn by this Court between economic injury and physical harm—and profoundly skewed the calculus of reprehensibility set out by this Court—by theorizing that breaches of an insurance contract that result in emotional distress are "akin to physical assault." App. 10a. It flouted this Court's admonition that a finding of reprehensibility may not be premised on acts dissimilar to the conduct at issue (or on entirely lawful conduct) by speculating that an insurer's refusal to admit bad faith in the litigation against it meant it was likely to be a recidivist in the future. App. 12a-14a. And it failed to heed this Court's clear direction that, in a case like this one, where a plaintiff has received substantial and full compensation for emotional distress stemming from

breach of an insurance contract, punitive damages should be limited to an amount at or near the amount of compensatory damages—instead approving an award nine times greater. App. 14a-16a.

These distortions of the guideposts set out by this Court in *State Farm* open the door to the possibility of grossly excessive, and potentially biased, punitive damages awards in bad-faith suits against insurers. *See, e.g., Oberg*, 512 U.S. at 432 (without clear standards guiding their imposition, punitive damages may be used to "express biases against big businesses, particularly those without strong local presences"); *accord State Farm*, 538 U.S. at 417. Large insurance companies may be particularly vulnerable to anti-big business, and anti-insurer, animus, and the Utah court's analysis does nothing to restrain the expression of such animus through the imposition of excessive punitive damages.

Punitive damages awards exceeding what is necessary for the legitimate purposes of retribution and deterrence can have serious negative social consequences. *See, e.g., Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (noting that the "threat of . . . enormous awards" can deter the development of new and potentially beneficial products); *Gore*, 517 U.S. at 593 (Breyer, J., concurring) (noting that excessive awards can result in overdeterrence of socially useful activity). That is particularly true in the case of insurance bad-faith actions. The threat of a bad-faith suit can potentially be a factor in nearly all litigation against a defendant with liability insurance where there is a possibility of a judgment in excess of policy limits. Indeed, it is routine practice for plaintiffs' attorneys to "'set up' the [defendant's] liability insurer by making a policy limits demand."[9] If the insurer refuses to settle the claim for the limits of the policy, and a judgment is later en-

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[9] John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 Drake L. Rev. 717, 746 (1998); *see also* Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1169 (1980) (explaining that plaintiffs "attempt to 'set up' insurers for excess liability claims under current duty-to-settle law").

tered against the insured in excess of the policy limits, "the insured has a potentially valuable claim against the insurer for violation of the duty to settle. This claim is often assigned to the victorious plaintiff in exchange for a covenant not to execute on the judgment."[10] (Indeed, that is precisely what occurred in this case. *See State Farm*, 538 U.S. at 413-414.) Because the threat of a bad-faith claim is present whenever an insurer considers whether to settle a claim against its insured for the limits of the policy, the risk of excessive punitive damages awards for conduct that a jury finds to be in bad faith is likely to skew insurers' incentives and to lead them to settle nonmeritorious claims.[11] The end result is that liability insurance—a social good—will be more difficult or more costly to obtain.

The "devastating potential for harm" posed by arbitrary and excessive punitive damages awards—ameliorated by the guidance provided in *State Farm*—is revived and exacerbated by the Utah Supreme Court's decision. It is thus critical that this Court correct that decision, not only to ensure compliance with its mandate in this case, but to ensure the continuing vitality of the constitutional standards for review of punitive damages that *State Farm* articulates.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Utah Supreme Court should be summarily reversed and the case should be remanded with instructions to enter an award of punitive damages at or near the amount of compensatory damages, consistent with this Court's opinion and mandate in *State Farm*. In the alternative, the Court should grant plenary review and set this case for briefing and argument.

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[10] Bauman, *supra* note 9, at 746.

[11] *Cf., e.g., id.* at 747 (discussing possibility that broad availability of emotional distress damages in bad-faith cases could induce insurers to settle invalid claims); *see generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) (discussing risk of overdeterrence from excessive punitive damages).

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